No. 82-1434

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

RICKY A. KNAPP,
Respondent.

Brief in Response to Petition for a Writ of Certiorari to the New York State Court of Appeals

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Questions Presented.

1. Whether the suppression of respondent's alleged complete oral and written confessions, the testimony of a police agent, and a massive amount of physical evidence, all upon the ground of violation of respondent's New York State constitutional right to counsel, leave the prosecution's case with evidence far less than overwhelming.

2. Whether the alleged admissions of respondent to a police agent who had interrogated respondent as an alter ego of the police in violation of the respondent's New York State constitutional right to counsel provided a legitimate basis for the issuance of a search warrant. If not, is the search warrant otherwise defective in basis and/or such that the evidence allegedly seized pursuant thereto should in any event have been suppressed?

3. Whether the decision of the New York State Court of Appeals, specifically limited to interpretation of the right to counsel, search and seizure and related New York State exclusionary rules, is a proper vehicle for this Court to review the Federal exclusionary rules.

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RICKY A. KNAPP,

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Brief in Behalf of Respondent Ricky A. Knapp in Opposition to Petition for a Writ of Certiorari to the New York State Court of Appeals.

Respondent, Ricky A. Knapp, submits this brief in opposition to the petition for a writ of certiorari seeking to review the determination of the New York State Court of Appeals in the instant case decided October 12, 1982 (57 NY2d 161).

Opinion Below.

In petitioner's description of the opinion below (petition, p. 6), the disposition of the New York State Court of

Appeals is misdescribed. As petitioner would have it, the Court of Appeals reversed and granted a "new trial." The opinion of the Court of Appeals (57 NY2d 161, 176) states specifically that ". . . case remitted to Otsego County Court for *further proceedings* on the Second Count in the Indictment." (Emphasis supplied.)

The distinction is significant in that the actual disposition of the Court of Appeals cannot be interpreted as concluding that there was sufficient evidence for a new trial, no less overwhelming evidence, but rather the Court of Appeals left to the Court of original jurisdiction the question of whether there was even sufficient remaining evidence to sustain a *prima facie* case in connection with any proposed new trial. This issue will be developed more fully at a later section of this brief dealing with the evidence that the petitioner claims remains available to petitioner in connection with any further proceedings.

Petitioner also interprets the decision of the Court of Appeals (petition, p. 7) as holding that the police agent ". . . had entered the investigation . . . ."

It is submitted that this is not a correct interpretation of the Court of Appeals decision and that the record demonstrates that the police, from the beginning, never considered the matter of the missing girl anything but a homicide investigation and, as specifically found by the Court of Appeals, at least by the time the police agent was set to work by the police, the matter was not only adversary in nature but the police were specifically out "to get Knapp" (57 NY2d 161, 170).

Jurisdiction.

It is also respectfully submitted that this Court also lacks jurisdiction in this matter in that there is present on this record no federal question nor any question of federal law but rather a state court's (in this instance, the New York State Court of Appeals) interpretation of the right to counsel rule, the exclusionary rule and related matters strictly upon the basis of the New York State Constitution. Merely because respondent, in the Courts below (including the Court of Appeals), had presented to those Courts, for persuasive value, reasoning and so forth, decisions of this Court and other Federal Courts, does not create a federal question nor render this matter a question of federal law where the Court of Appeals has specifically stated that its decision was made ". . . under settled principles of *State constitutional Law* . . ." (57 NY2d 161, 173). (Emphasis supplied.)

Statement of the Case.

On the evening of December 9, 1977, Linda Jill Velzy, an eighteen-year-old female student at the New York State University at Oneonta, New York, disappeared. Her disappearance was initially reported to campus security police, who notified the Oneonta Police Department. Eventually, these agencies, in addition to the New York State Police, conducted a joint investigation into the disappearance.

Information available from friends and family of Miss Velzy clearly indicated that foul play was involved in her disappearance.

An intensive search was begun and carried out as a "missing person" investigation (even though the police

later conceded that it had been a *homicide* investigation from the outset). A search was made of the surrounding countryside which included the use of helicopters and bloodhounds. The police questioned over one hundred people, including respondent.

When questioned, on December 12, 1977, respondent informed the investigating officers, Detective Angellotti and Investigator Dabreau, of his whereabouts on December 9th and denied any knowledge concerning the Velzy disappearance. During the course of this conversation, at the request of the officers, respondent agreed to submit to a polygraph examination. The police thereafter from time to time continued to question respondent and communicate with his family.

Throughout the investigation, respondent was under felony indictment in connection with a previous matter and had retained the services of attorney John H. Owen of Cooperstown, New York. The previous matter remained pending through the Velzy investigation.

As a consequence of the request that respondent take a polygraph examination, respondent contacted Owen, who advised him to not submit to the test. The police continued questioning respondent on several occasions, until on December 15 or 16, Owen telephoned Detective Angellotti, and informed him that he (Owen) had advised his client not to take the polygraph test, and directed the police to either arrest respondent or cease their harassing questioning of him.

Although *direct* attempts to question respondent ended in compliance with Owen's demand and were not resumed until after respondent's subsequent arrest (January 1,

1978), later in December, 1977, members of the consolidated investigating team arranged to question respondent *indirectly* through an agent, one Arthur Hitt.

Hitt, the owner of a logging site where respondent occasionally worked, was then under indictment for various felony offenses. When the police first attempted to question Hitt, he refused to talk with them without his attorney being present. Eventually, on December 15 or 16, Investigator Dabreau called attorney Terence P. O'Leary (Hitt's attorney) and asked O'Leary whether Hitt was going to cooperate with the police in the Velzy matter. O'Leary responded that, under certain conditions, Hitt would cooperate.

Obviously, sometime between the time the police first attempted to question Hitt and the time when Investigator Dabreau called O'Leary, Hitt had conferred with O'Leary and told O'Leary that respondent had requested of him, on December 12, some sort of alibi for the evening of December 9th; this alleged alibi request supposedly led Hitt to believe that Knapp was responsible for a crime involving the Velzy girl.

In connection with Hitt and his allegations, on December 21, 1977, a conference was held in the Chambers of the Otsego County Judge, Hon. Joseph A. Mogavero, Jr. At this conference, Judge Mogavero offered official consideration and motivation to Hitt to assist the police agencies in the investigation of respondent with rewards to follow in the event of the arrest of respondent. As noted, Hitt had retained his own attorney, and this attorney (O'Leary) interpreted the mission as assigned to Hitt in the Judge's chambers as being one "to get Knapp."

During the next ten days, Hitt made several telephone calls to respondent which were recorded by State Police investigators. In the same period, the State Police also outfitted Hitt with recording equipment for several face-to-face meetings with respondent. Hitt was guided by members of the State Police as to how he should question respondent.

By pre-arrangement, Hitt was to tell respondent he (Hitt) did not believe respondent had hid the body well enough and propose that they re-bury it on the Hitt logging site. Allegedly, this prompted respondent to allegedly admit to Hitt, in an unrecorded conversation, on December 31, 1977, that he had killed the Velzy girl. In any case, it was decided to re-bury the body the next day on the Hitt logging site.

Hitt related this alleged information to the State Police, for whom he was working, and a stakeout was set up at the Hitt logging site on January 1, 1978.

Shortly after 6:00 P.M. Hitt and respondent arrived at the logging site with the body in the trunk of Hitt's automobile. Moments later respondent was observed dragging a frozen body to a grave which had been prepared by Hitt with his bulldozer, whereupon the State Police then and there arrested him.

At the trial, certain officers testified that respondent made certain exclamations indicating that he was guilty of the murder of the girl, while other State Police officers in the same area would testify that they heard no such exclamations.

Respondent was not taken to the Command Post in the Municipal Building in Oneonta, nor to the nearby State

Police Barracks, but instead was taken by Investigators McElligott and Allen all the way to the State Police Headquarters at Sidney, New York, a distance of nearly forty miles.

McElligott and Allen later claimed that they there obtained a voluntary, three-page written confession.

Meanwhile, Hitt was presented to a local magistrate and gave testimony under oath in support of an application for a search warrant as to defendant's automobile. The warrant was issued and resulted in the introduction at the trial of massive amounts of physical evidence, mostly over defense objection, most of which objections went beyond the claimed invalidity of the warrant.

The Otsego County Grand Jury returned a two-count Indictment charging defendant with both intentional murder (Penal Law, 125.25, subd. 1) and reckless murder (Penal Law, 125.25, subd. 2).

The jury acquitted respondent of intentional murder but convicted him of reckless murder.

The defendant appealed to the Appellate Division of the New York State Supreme Court, Third Judicial Department, which Court erroneously affirmed the judgment of conviction (Mikoll, J., dissenting). The basic errors of the Appellate Division consisted of failing to hold that, in addition to the written confession, all alleged admissions obtained by the police agent, Arthur Hitt, and all physical evidence obtained pursuant to the search warrant should have also been suppressed; and error in holding that, at least following a proper suppression ruling, the remaining evidence was not overwhelming such that the errors made

by the County Court (and the Appellate Division), as to suppression, were not harmless errors. Leave to appeal to the Court of Appeals was granted and it reversed and remitted for further proceedings, finding that all admissions allegedly obtained, at least those obtained after Owen's telephone call to Detective Angellotti on December 15 or 16, should be suppressed, as well as the fruits thereof (specifically identifying them to conclude all of the physical evidence seized pursuant to the search warrant based upon the unlawfully garnered admissions). Rather than find the remaining evidence to be overwhelming and the failure to so suppress being harmless error, the Court of Appeals found that evidence excised from the prosecution's case constituted the very core thereof. A motion for reargument was denied by order dated December 14, 1982.

Reasons for Denying the Writ.

A. The suppressed evidence constitutes the very core of the prosecution's case such that there remains not only no overwhelming evidence but evidence insufficient to support a prima facie case at any new trial.

Petitioner begins his argument by insisting that there remains, following suppression, sufficient overwhelming evidence in support of conviction. In doing so, he misstates the suppression directed by the Court of Appeals in that he speaks of suppression only in terms of oral and written alleged confessions, overlooking the suppression of a massive amount of physical evidence seized from respondent's automobile pursuant to the warrant.

In particular, the Court of Appeals directed suppression of any and all admissions allegedly obtained (at least after Owen's telephone call to the Police on December 15 or 16,

1977) by the police agent or by the police themselves and, because the search warrant was based upon the improperly obtained admissions allegedly obtained by the police agent, the materials seized under the warrant was also suppressed as fruits of the poisonous tree.

Turning now to petitioner's effort to marshal remaining evidence in support of a *prima facie* case at any new trial in this matter, the following should be noted:

(1) As to the respondent's possession of the frozen body on January 1, 1978 (erroneously stated as January 1, 1981, at p. 16 of the petition), the corpse as well as respondent's presence at the grave site is included in the suppression by the Court of Appeals in that the location of the body, arrangements for its transfer and respondent's presence at the reburial site are each, according to the prosecution's version of the case, products of incriminating admissions allegedly obtained by the police agent, Arthur Hitt.

(2) As to the alleged spontaneous declarations allegedly made by respondent at the time he was pounced upon, knocked down, threatened with a weapon and seized by the police at the time of the arrest at the gravesite, it should be noted, in the first place, that these admissions go almost totally to that count of the subject indictment charging intentional murder, of which respondent has already been acquitted. In the second place, these alleged spontaneous admissions (which were discredited by the jury at the trial already held) will presumably be discredited by the jury at any forthcoming trial for the reason that there is no explanation for the situation where certain police officers allegedly heard (different versions) of these admissions but other police officers in the identical area failed to hear any such admissions.

(3) As to the alleged medical evidence, since the corpse has been suppressed, there can be no medical evidence since all of the medical evidence at the earlier trial herein was based upon an autopsy of the deceased. Even if there were remaining some medical evidence, such evidence can hardly be considered overwhelming because, in the first place, it fails to establish any time of death or even any cause of death with any certainty whatever and, secondly, even if the medical evidence were totally probative, it would do nothing but establish the time of death and the cause of death but would not include any evidence linking respondent to the death.

(4) As to the alleged request for an alibi made by the respondent to Arthur Hitt, which allegedly preceded Owen's telephone call to the police, that matter, even if not suppressed, is subject to the credibility of Arthur Hitt, a felon and once a suspect in the Velzy matter himself, the owner of the re-burial site, the supplier of the automobile and most of the other implements used in the re-burial attempt, and a police agent who was equipped with recording equipment for extensive periods of time (but who fails to explain why none of the alleged admissions obtained from respondent are recorded, but rather so unfortunately allegedly uttered at a time when conversations between Hitt and the respondent were not being recorded).

The claim that there exists other "circumstantial evidence linking the defendant to the deceased" (petition, p. 16) is simply too vague to deal with in any way.

Respondent fails to understand petitioner's reference (petition, p. 16) to suppressed evidence as somehow supporting the point that, given suppression, there remains overwhelming evidence of guilt.

In any case, any alleged statement to Hitt is subject to Hitt's credibility. The unsuppressed physical evidence is totally unprobative and irrelevant in most respects.

B. Hitt was clearly a police agent as a matter of fact and New York State law and as an alter ego of the police, he was not permitted to take any action that the police were not permitted to take in violation of respondent's New York State constitutional rights and any alleged admissions obtained by him can not serve as a valid basis for a search warrant.

Among the first things that become apparent in connection with petitioner's argument concerning the status of Arthur Hitt is that petitioner, without claiming that Section 60.45(2) of the New York State Criminal Procedure Law is unconstitutional under federal standards, is nonetheless asking this Court to review the determination of New York State's highest Court, interpreting New York law and deciding that Hitt was an agent as a matter of law under New York State law.

While it is apparently true that New York State law does not contain a specific definition of the term "police agent," it is also true that *People v. Cardona,* 41 NY2d 333 (1977), sets forth more than sufficient guidelines for a determination as to whether a particular individual is in the particular context of the case at issue "a police agent." Indeed, it would appear that it is virtually impossible to do more than set out considerations and guidelines concerning such a question and that a specific definition would be unworkable and useless.

The situation at bar does not authorize petitioner to create a definition of a police agent and, it is respectfully

submitted, petitioner has done just that at page 17 *et seq.* of the petition.

For instance, petitioner would create a definition that includes a question of whether the police were acting in good faith when they dispatched the non-police individual to act on their behalf, but such a proposition is found nowhere in New York law.

Assuming, *arguendo,* that the issue was and remains reviewable by this Court, it seems beyond dispute on this record that Hitt was not anything like the ordinary informer, as petitioner would have it, but was more like a police investigator himself, albeit without badge.

The most significant distinction between an informant and an agent would seem to be that an informant initiates contact with the police to impart incriminating information gathered by him without the active solicitation or assistance of police whereas the agent is one who is instructed, guided and sent out to operate in a certain manner with the purpose of obtaining incriminating information and/or proof.

In the case at bar, Hitt may well have given to the police some minor and dubious information in terms of appellant's alleged request for an alibi (after they had first approached *him*). This relatively minor disclosure, however, is totally consumed by the fact that Hitt was thereupon instructed, wired, sent out to meet with, cultivate, drink with and question respondent, as a result of which Hitt allegedly obtained from respondent a complete confession to a murder—information which he did not have prior to his recruitment by the police and which he only brought back to the police well after his initial recruitment.

Against the contention that Hitt could be somehow viewed as merely a cog in the wheel of the attempt to find a missing person, it is well to recollect here again that Hitt's attorney's clear interpretation was that Hitt's function was "to get Knapp."

Beyond this, it should not be overlooked that Hitt was, at the beginning of the investigation, a serious suspect himself, as evidenced by the fact that Hitt's logging site had been searched by the police. So that the situation can be accurately viewed, Hitt either went to the police (after they had first come to *him*) to make an arrangement in connection with his own dilemma—a prior felony record and multiple felony charges pending or with respect to his situation as a suspect with potential murder charge against himself. He was not one who even initially came to the police personally or through his attorney but rather can be viewed as one who was *turned* by the police from the position of a suspect, already destined for state prison on other charges, to the position of insulated agent, insulated both with respect to incarceration on his pending felony charges as well as arrest and incarceration in connection with the Velzy matter.

Petitioner's attempts to make the point that Hitt was not recruited by the police to circumvent respondent's right to counsel as it then existed, citing the fact that neither *People v. Rogers,* 48 NY2d 167 (1979), nor *People v. Skinner,* 52 NY2d 28 (1980), had been decided at that time; however, when it is recalled that respondent's counsel telephoned the police on December 15 or 16, he explicitly told the police that they were to either arrest respondent or cease their questioning of him. Under this interdiction, the police then could no longer implement their desire to question appellant arresting him, thereby placing him in custody.

The right to counsel, even at that time, would have attached to a situation where the police had placed appellant in custody, vis-a-vis the prior entering of the proceeding by respondent's attorney. See *People v. Donovan*, 13 NY2d 148 (1963); *People v. Gunner*, 15 NY2d 226 (1965).

The only way that the police could continue to question respondent was to circumvent his right to counsel which would attach upon his being placed in custody, by leaving him free to have him questioned by a police agent while free.

The police themselves seem clearly to have recognized the constitutional problem created by the telephone call from Owen. If they did not, they would have gone right on questioning respondent directly instead of completing Hitt's recruitment (apparently within 24 hours of the phone call), and continuing their questioning surreptitiously. Cf. *People v. Ferrara*, 54 NY2d 498, 508 (1981).

Concerning the warrant and the physical evidence seized as a result thereof, the evidence so seized is inadmissible upon multiple grounds although it was only necessary for the Court of Appeals to determine that it was inadmissible on the grounds of Hitt's status as an agent of the police and his inadmissible statement in support of the warrant. However, there were raised in the Court of Appeals, as there was in the lower Courts, contentions that the evidence seized pursuant to the warrant was also inadmissible in view of the fact that the warrant was based in significant part upon the inadmissible confession allegedly procured by the police from the appellant at the State Police Headquarters following his arrest. Defects in the warrant itself and other issues were also raised but which were obviously not necessary for the decision reached by

the Court of Appeals, which rested its decision to suppress the physical evidence on the other grounds.

Concerning *Massiah v. United States*, 377 U. S. 201 (1964), it should be noted that, even if *Massiah* is (irrelevantly) distinguishable from the case at bar, the Court of Appeals pains to point out specifically that the decision there was made upon the basis of respondent's *State* constitutional rights (majority opinion, pp. 1 and 8) and not on the basis of whatever his federal constitutional rights might be; and it appears to be of some significance that *Massiah* was not cited in the majority opinion but only in the concurring opinion of Judge Meyer.

Moreover, *Massiah* is in fact distinguishable on the basis that Massiah was under indictment at the pertinent time whereas respondent here was not. The indictment in *Massiah* and under *federal* law *at that time* represented the earliest moment of the right to counsel, but, under New York law, the right to counsel is triggered much earlier as a result of the authority of *Rogers* and *Skinner*.

The holding that Hitt was a police agent does nothing to handcuff the police in that the police remain totally free to accept the contributions of ordinary informants. It is only when they convert the status of such an informer to that of an agent and set him to work for them in a constitutionally impermissible manner, that they can be considered to be hampered in any way, and then more than justifiably so.

C. A decision of New York's highest Court which is specifically limited to interpretation of respondent's New York State constitutional rights as they relate to certain of the so-called exclusionary rules is not a proper vehicle for this Court to review the federal exclusionary rules.

It is respectfully submitted that, under our system of government, the people of each state are free to adopt their own State Constitutions, the Courts of each State are permitted to interpret those State Constitutions and such interpretations are unreviewable by this Court only to the extent that such interpretations run afoul of the United States Constitution.

In the subject petition, petitioner is asking this Court to interpret the rights of individuals in the State of New York under the New York State Constitution, there being no claim that those rights as interpreted by the Courts of the State of New York are in any way in conflict with any requirements of the United States Constitution.

Petitioner makes not a legal argument but rather a policy argument based upon the attitude of certain groups in American society toward the so-called exclusionary rules.

It is well known that for some time such groups have been seeking a proper vehicle to provide the basis for an authoritative review of the exclusionary rules.

Yet, it is respectfully submitted that such advocates must find a proper vehicle to review the federal exclusionary rules and another means if they wish a further review of those rules by New York State's system of

justice, beyond that represented by such precedents as *People v. Rogers, People v. Skinner* and the instant case.

Moreover, petitioner advocates only one side of the issue—that concerning the supposed hamstringing of law enforcement agencies—ignoring the rights of individuals facing the massive force of the State (of which the combined police investigation here involved is an excellent example) and their right to retain legal counsel to deal with the State and the right, if such procedures are disregarded, to have the tainted fruits of such unlawful activity excised from the evidence upon trial.

Petitioner goes on at great length about supposed good faith upon the part of the police (a factor not presently installed either in federal or New York law, to the best of respondent's knowledge) while overlooking the fact that respondent here, to the certain knowledge of the police in the rural area involved, had the services of an attorney in connection with a well-publicized prior criminal case which attorney-client relationship was, also to the certain knowledge of the police, still subsisting with the criminal case to which it related still pending, and with respondent having given ample evidence as early as December 12, 1977, that he felt totally inadequate to deal with the police without the aid of his counsel.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated: Oneonta, New York
March 28, 1983

Respectfully submitted,

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